Supreme Court, U.S.
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No. 95-849

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

Joyce H. Crandon, Petitioner
vs.
Frankie D. Dunnick
(former) Commissioner of the Kansas Banking Commission,
Individually, Respondent

On Petition For Writ of Certiorari
To the Supreme Court
of the United States

Petitioner's Reply to Respondents Brief in Opposition to

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a special assistant attorney general employed by the State of Kansas, Banking Commission as General Counsel can be fired for exercising of her First Amendment rights of Freedom of Speech, where she inquires about federal law and policy to the Regional General Counsel of the Federal Deposit Insurance Corporation [FDIC]?

Whether all attorneys lose their First Amendment right to freedom of speech when they accept employment for the State of Kansas?

Whether the Kansas Supreme Court erred in affirming the district court's granting summary judgment when there were disputed material facts?

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STATUTES

U. S. Constitution, First Amendment:
42 U.S.C. §1983. Civil action for deprivation of rights
42 U.S.C. §1988. Proceedings in vindication of civil rights
18 U.S.C. § 213
28 U.S.C. § 1257

STATUTE INVOLVED

28 U.S.C. § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . . any right is specially set up or claimed under the Constitution or authority exercised under the United States.

42 U.S.C. § 1983. Civil action for deprivation or deprivation of rights

Every person who, under color of . . . . any State, . . . subjects, any citizen of the United States. . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

IURISDICTIONAL STATEMENT

Petitioner submits herewith the jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257.

28 U.S.C. § 1257. State courts; certiorari

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deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The statutory provision conferring jurisdiction on appeal: This appeal is taken pursuant to U.S.C. 28 §1257.

This case involves a federal question involving 42 U.S.C. §1983. A federal question in a civil action for deprivation of civil constitutional right of freedom of speech. In that Dunnick, Respondent, Kansas Bank Commissioner under color of state law caused a citizen of the United States to wit: Crandon, Petitioner, former General Counsel to the Kansas Banking Department and special assistant Attorney General of the State of Kansas, to be deprived of her rights and privileges secured by the United States Constitution i.e. her right to Freedom of Speech under the First Amendment in violation of the Federal Constitution and 42 U.S.C. § 1983.

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PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Joyce H. Crandon, the petitioner herein, prays that a writ of certiorari issue to review the summary judgment of the Supreme Court of the State of Kansas.

RULES OF PROFESSIONAL RESPONSIBILITY

Important to this case is the fact; that Dunnick, after receiving the trial courts summary judgment, filed a complaint against Crandon with the Kansas Attorney Disciplinary Administrator. That office conducted a through investigation into the allegations against Crandon and found that Crandon had not violated any of the Model Rules of Professional Responsibility for Attorneys. The complaint was dismissed. Specifically that tribunal found that Deputy Commissioner Stork was not the client of the Petitioner. Crandon was hired to represent the State of Kansas as special assistant attorney general not Deputy Commissioner Stork or the Respondent personally.

The Kansas Attorney General is representing the State of Kansas and the Respondent is his individual capacity in this matter: the State of Kansas apparently waives the sovereign immunity of the 11th Amendment in the federal civil rights action under 42 U.S.C. § 1983.

The summary judgment of the Kansas Supreme Court puts the government attorney in an impossible position; unable to inquire from co-regulators for fear of ethical

problems; yet fearful of violating the broader public interest/public trust concept. The Kansas Supreme Court then did not allow a trial to determine the true facts.

DISPUTED MATERIAL FACTS

Petitioner agrees with the Respondent that there are disputed material facts in this federal civil rights cause of action in which the Supreme Court of the State of Kansas granted summary judgment: and therefore summary judgment should not have been granted.

At the time that the Petitioner was employed as General Counsel to the Kansas Banking Department it was the policy and rule of that department, that no one employed for that department was allowed to have loans at state-chartered banks in Kansas. [Crandon deposition–Dunnick deposition exhibit].

As part of the review and research of the matter, Crandon telephoned Regional General Counsel of the FDIC Lamberti, in June, 1992, to inquire about federal law, federal regulations, and related policies regarding extensions of credit to bank examiners and their spouses. [Crandon deposition p. 232.]

Petitioner was performing her duty to the State of Kansas Banking Commission by doing legal research concerning controversial issues surrounding a high-ranking government official, at the request of Review Examiner Berggren. Review Examiner Berggren was performing his duty to the Banking Commission of the State of Kansas by investigating the matter of the loans of a high-ranking government official.

The Petitioner's subpoenaed bank examination records of the Southwest Bank & Trust corroborated that Deputy Commissioner Stork has examined the Southwest Bank & Trust. [Crandon deposition subpoenaed documents]. Crandon testified that she knew that Stork had examined that bank. [Crandon deposition]. Berggren knew that she had examined the Southwest Bank & Trust. [Berggren deposition and exhibits]. This disputed fact is material to this case.

Review Examiner Berggren was removed as Review Examiner of the Baileyville Bank examination, in retaliation for his investigation of the Stork loans. Berggren was afraid

that he was going to get fired also. [Berggren deposition and exhibit # 55 and Stover deposition, Myers deposition].

When Petitioner made inquiries about the Stork loans, the FDIC attorney stated that it sounded like something that needed to be investigated. [Crandon deposition and Lamberti deposition].

Important to the facts of this case was the fact that a bank examiner employed with the Kansas Banking Commission; Examiner Emery was being prosecuted in federal district court in Wichita, Kansas for a violation of 18 U.S.C. 213. She pled guilty to a violation of 18 U.S.C. 214 and was fired from her job. [Petitioner's discovery subpoenaed transcript of Emery hearing].

Crandon was General Counsel to a state agency, she had no duty to give legal advice to high-ranking governmental officials about their private business.

It is uncontroverted that one of Crandon's primary job duties was to "give legal advice and counsel to Review Examiners at the Kansas Banking Commission". [Dunnick deposition p. 2. exhibits] In reviewing the matter, Crandon consulted statutes, regulations and relevant cases. [Crandon deposition p. 350.] In addition, she obtained copies of Stork's home mortgage, auto registration,[1] and other information which confirmed the existence of loans. Crandon knew that Deputy Commissioner Stork had examined the Southwest Bank and Trust. [Crandon deposition p. 260.] The fact that Deputy Commissioner Stork had examined the Southwest Bank and Trust was not ever denied by Respondent during discovery. The evidence verifies and collaborates that Deputy Commission Stork did exam the Southwest Bank & Trust. [Crandon subpeoaned documents--Southwest Bank & Trust bank examinations].

Petitioner was making inquiries about federal laws, regulations and ethics policies from a co-regulator of state-chartered banks in Kansas. Petitioner gave no legal opinion to the FDIC. [Lamberti deposition].

Crandon tried to discuss the matter of the Stork loans with Dunnick. He harshly responded, "don't mention Judi

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1 All a matter of public record in the State of Kansas.

[Deputy Commissioner Stork], I've taken care of that." He stated that, "I know you've been talking to Eric [Review Examiner Berggren], I want you to know that no one goes over my head to the FDIC–it makes me look like I don't know what's going on." [Crandon deposition p. 2 exhibit notes.]

Dunnick then stated angrily "that if Crandon 'did anything' about this; that he knew people, had 'connections' and would 'make it hard on her' [Crandon]". Dunnick repeated twice; that if Crandon 'did anything' about the termination, she would "regret it." [Crandon deposition p. 2 exhibit notes.]

The Respondent stated that there was no evidence that Petitioner had done any reporting to the FDIC. [Lamberti deposition]. The FDIC attorney Lamberti stated that there was no reporting. [Lamberti deposition].

Respondent had no authority with the U.S. Justice Department. The State Bank Commissioner does not have authority to act on violations of federal law. When state bank examiner Emery was arrested and charged with a violation of 18 U.S.C. 213 the state bank commissioner was not notified by the U.S. Justice Department that they were going to file charges against Examiner Emery.

Petitioner performed a through complete review of the facts as it related to the Stork loans.

AUTHORITIES AND ARGUMENT

Respondent states at p. 8 "Petitioner cannot find solace in Waters v. Churchill, 511 U.S.____, 128 L.Ed. 2d 686, 114 S.Ct. 1878 (1994). The opinion is a plurality and, therefore, has no precedential value. Marks v. United States, 430 U.S. 188, 193, 97 S.Ct. 990, 51 L. Ed 2d 230 (1977). citing, Gregg v. Georgia, 428 U.S. 153, 169, n. 15. 49 L.Ed 2d 859, 96 S.Ct. 2909 (1976)."

The United States Supreme Court did not rule in Mark and Gregg Id. that a plurality opinion of the U.S. Supreme Court has no precedential value.

Further, Petitioner is not seeking solace–she is seeking justice.

SUMMARY JUDGMENT

The Supreme Court ruled in Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed. 2d 458:

> Summary judgment is authorized only where moving party is entitled to judgment as a matter of law, where it is clear what the truth is, and where no general issue remains for trial; purpose of the rule is not to cut litigants off from their right of trial by jury if they have issue to try.

In the instant case both the Petitioner and the Respondent agree that there are disputed material facts. The Kansas Supreme Court has granted summary judgment on a claim in the Kansas state court alleging a violation of a federal law and the First Amendment to the federal constitution.

In Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 26 L. Ed. 2d 142; another cause of action alleging a violation of 42 U.S.C. § 1983 the Supreme Court ruled as to the issue of summary judgment,

> Summary Judgment for defendant store owner in civil rights action by plaintiff who alleged that she had been denied service because she was in company of Negroes, that there had been policeman in store restaurant, and that she was arrested for vagrancy while leaving, was improper where defendant's showing did not foreclose possibility that there was policeman in store while plaintiff was awaiting service and that this policeman reached understanding with some employee that plaintiff not be served.

In another civil rights case involving 42 U.S.C. § 1983 alleging violations of a citizens First Amendment case Perry v. Sindermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570, the Supreme Court ruled:

> In action by junior college professor attacking nonrenewal of his contract, professor's allegations that decision not to rehire him was based on his public criticism of the regents presented bona fide constitutional claim, precluding summary judgment. unnecessary abridgment of right of free speech.

CONCLUSION

Crandon has come forward with a prima facia case sufficient to be entitled to present her case to a jury.

Crandon has demonstrated that there the Kansas Supreme Court affirmed the district's court summary judgment based on an opinion that conflicts with Waters v. Churchill, 114 S. Ct. 1878, 128 L.Ed. 2d 686, ____ U.S. ___(1994) and Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L.Ed. 2d 708 (1983).

Additionally the plaintiff has demonstrated that summary judgment was granted based on disputed material facts. Only a trial to a jury will bring out all the facts in this important case for all attorneys in government service.

For the foregoing reasons this petition for writ of certiorari should be granted. Or the matter be remanded for a trial by jury to determine the facts and the law as it relates to the facts of the matter.

Respectfully submitted

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